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NO. 283

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

A MOTION THAT THE COURT RECEIVE INFORMATION ON CERTAIN AMBIGUOUS AND ERRONEOUS STATEMENTS CONTAINED IN TWO BASIC DOCUMENTS IN THE RECORD

DONALD F. KNOX
Petitioner

vs.

THE STATE OF OHIO
Respondent

Donald F. Knox
127 W. Northwood Ave.
Columbus, Ohio

Petitioner

MOTION

The petitioner requests that the Court receive the accompanying comparison of the factual backgrounds of the respective appeals of John L. Crabtree et al. and Donald F. Knox to the State Personnel Board of Review. The importance of this comparison rests upon the petitioner's finding that certain erroneous statements were made with regard to the background of the Crabtree case by the appellee in the Memorandum Contra Motion for Rehearing to the Supreme Court of Ohio. The object of said Memorandum was to prove that the petitioner could not have rightly claimed that the decisions in the above two cases were contrary and consequently could not have claimed a denial of equal protection of the law. Furthermore, the petitioner's former attorney made no effort to bring this matter to the attention of the Supreme Court of Ohio.

Also, the petitioner notes that there are certain ambiguous statements contained in the decision of the Court of Appeals of Franklin County, Ohio in the petitioner's case which may relate to the above problem.[1]

The petitioner believes that the above matter, as contained in those two basic documents in the record of this case, constitutes a serious problem in the consideration of petitioner's case by this Court. Therefore, the petitioner requests a review of the matter.

Respectfully submitted,

Donald F. Knox
Petitioner

[1] That decision is contained in the Appendix B to the Petition for Writ of Certiorari, under the cover entitled "Appendixes."

A COMPARISON

OF THE

KNOX AND CRABTREE CASES

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Cases

In the Matter of the Appeal of John L. Crabtree et al. from a Decision of the State Personnel Board of Review (Court of Appeals of Franklin County, Ohio, No. 8430-35; Supreme Court of Ohio, No. 40749-54). 1-5, 7-11

Statutes

Revised Code of Ohio

Section 143.08 (A)	3
Section 143.08 (A) (7)	2
Section 143.08 (A) (12)	3, 9
Section 143.08 (B)	3
Section 143.08 (B) (2)	3

CLARIFICATION OF THE TERMINOLOGY

The objective of this analysis by the appellant-petitioner Knox is to demonstrate that the appellee was in error in the Memorandum Contra Motion for Rehearing to the Supreme Court of Ohio wherein an attempt was made to distinguish between the appeals of Knox and Crabtree to the State Personnel Board of Review. Furthermore, it will be demonstrated that the appellee presented ambiguous and erroneous statements in pursuing such an effort.

Since certain ambiguities will be encountered in the Memorandum cited above, it is necessary first of all to present an explanation of the two different meanings attached to the term "classified service". The most obvious and widely used meaning is that a person in the classified service is one who has a designation on his personnel record and thus falls under the regulations and protection regarding job tenure as provided by such status. Such a person for purposes of this analysis will be spoken of as being "formally" in the classified service. Another meaning of the term refers to an employee who, although not "formally" carried in the classified service, works at a job that <u>should be</u> "formally" carried in the classified service on the basis of a specific section of the Revised Code of Ohio. Such an employee has for some reason not been "formally" placed in the classified service and will be described as being "in essence" a classified employee as an indication that he should be "formally" classified.

The fundamental basis for comparison of the two cases is to be found in the transcripts of the respective hearings before the State Personnel Board of Review. The transcript in the <u>Knox</u> case indicates that Knox was not formally classified since he had been hired into the

unclassified service (p. 4). However, Knox maintained at that hearing that he was in essence a classified employee, meaning that he should have been classified; the appellee opposed that claim. The basis of Knox's claim to being in essence a classified employee was that his job as one of the three chief night clerks at University Hospital of Ohio State University could not be considered as falling within any category listed in paragraph (7) of Section 143.08 (A), Revised Code wherein was listed those categories of employees in educational institutions that might be excluded from the classified service. The Board and the appellee agreed with Knox's position that he should be returned to his job if the Board should find that he was in essence a classified employee and thus improperly carried in the unclassified service (transcript, pp. 36-37). In other words, all parties fully accepted the theory that an unclassified employee who claims that he is in essence a classified employee has a right to appeal the question of his unclassified status to the Board.

AN ANALYSIS OF THE CRABTREE CASE

Turning next to the Crabtree case, it is necessary to present the facts and law that are basic to that case. Crabtree and five others were hired into the unclassified service in the period of 1956-62 by the Department of Natural Resources as unskilled laborers and thus designated as Laborer I and II in the classification system as indicated on their personnel records. They were dismissed from their jobs in early 1964 without regard to the procedure required in terminating classified employees; an appeal was brought before the Board on March 12, 1964 on the basis that they were in essence classified employees and had been denied protection of the civil service law in the matter of their dismissals. They requested a return to their jobs and back pay.

The controlling sections of the Revised Code of Ohio in the Crabtree case were 143.08 (B) (2) and 143.08 (A) (12). Section 143.08 (B) states that the classified service includes the competitive class and the unskilled labor class and paragraph (2) states that the "unskilled labor class shall include ordinary unskilled laborers" and then continues to describe the procedure by which such workers are to be tested and appointed. Section 143.08 (A) lists the positions within the state civil service that may be left in the unclassified service, and paragraph (12) refers to laborers with the statement that "such unskilled labor positions as the director of state personnel... may find it impracticable to include in the competitive classified service provided such exemptions shall be by order of the commission or director, duly entered on the record... with the reasons for each such exemption..."

At the hearing of the Crabtree case before the Board the objective of the appellee (the Department of Natural Resources) was to demonstrate that the Civil Service Commission (the predecessor in terms of office and function of the present Department of State Personnel and the State Personnel Board of Review) had validly removed the entire unskilled labor class from the classified service in 1923 and that said policy had been sustained right up to 1964 on the basis of Section 143.08 (A) (12), Revised Code. The appellants claimed that said effort was illegal since it was not in conformity with the terms of the statute just cited above.

The Board found that the Civil Service Commission had validly removed the entire labor class from the classified service by several actions over the years beginning in 1923 and on that basis decided that Crabtree et al. did not possess the quality of being classified employees in essence and thus did not have a right of appeal to the Board on

the further question of the legality of their dismissals. There was no disputing the fact that they were unclassified, formally speaking; the dispute was with regard to whether or not they should have been carried in the classified service, and the Board decided to the contrary.

The above is essential background information relative to the question of whether or not the Knox and Crabtree cases were identical upon their respective appeals to the Board; the appellant-petitioner believes that the question could be settled in his favor upon the above information only if it were not for certain ambiguous and outright erroneous statements contained in the record of the two cases. As a result, the matter must be examined further.

At the hearing of the Crabtree appeal before the Board, testimony was read into the record from the minutes of the Civil Service Commission in order to determine just what had been the state policy over the years regarding the labor class. In separate instances in 1923 1930, and 1941 the Commission supplied reasons for excluding a major segment of the labor class from the classified service and in each instance used a specific hourly wage rate as the demarcation point between the classified and unclassified employees (pages 14-18). In 1950 the Commission stated only that "it would be impractical at this time to include such unskilled labor positions in the competitive classified service" and did not provide for any classified laborers (p. 13).

Testimony was received from the Assistant Director of the Department of State Personnel regarding the classification of the labor class over the years; he stated that all laborers were in the unclassified service at that time and that such a policy had been in effect "for many, many

years..." (p. 23). In an argument presented by the Assistant Attorney General, the latter stated that total exclusion of the labor class from the classified service was a policy that went back to the action in 1923 by the Commission (p. 8). At a later point the latter stated that the wage rates used by the Commission in 1923, 1930 and 1941 were the actual hourly wages paid to unskilled laborers at the time, with the purpose being to distinguish wholly unskilled laborers from those with some special skills as a result of there being no job classification system at that time (p. 23). His point evidently was that the Commission placed all totally unskilled laborers in the unclassified service and allowed those with some special skill as reflected by a higher wage rate to remain in the classified service.

In summary, the transcript clearly demonstrates that a large segment of the labor class was carried in the unclassified service from 1923 to 1967 as a result of specific acts of the Commission in 1923, 1930, 1941 and 1050; furthermore, the Assistant Director of the Department of State Personnel testified that the entire labor class had been unclassified for "many, many years...." (p. 23).

A CONSIDERATION OF THE DECISION OF THE COURT OF APPEALS IN THE CRABTREE CASE

Before proceeding to the principle objective of the analysis, the appellant-petitioner believes that it would be of value to inspect certain sentences contained in the decision of the Court of Appeals in the Crabtree case. In certain instances it appears that the Court was saying that the entire labor class, including Crabtree et al., was removed for the first time from the classified service by the 1950 action of the Civil Service Commission, which

of course was not the case. The transcript would seem to indicate that most if not all of the labor class was unclassified as far back as 1923 and that the 1950 action merely sustained the previous policy. At the middle of page 3 of that decision there is the statement that the "motion of the Attorney General was supported by evidence designed to show that the former employees were removed from the classified service by an action of the former Civil Service Commission under date of January 12, 1950. ..." Such of course is not the case. First of all the former employees were hired into the unclassified service several years after the 1950 action. Secondly, the Assistant Attorney General emphasized that the exclusion of the labor class from the classified service was a policy originating in the 1923 action of the Commission (p. 8 of the Transcript). Next, there is the sentence at the bottom of page 7 of the Decision in which it is stated with reference to the 1950 action of the Commission that "The next result of such an order is to exclude all unskilled laborers in the state service from the protection of the civil service statutes. ..." The statement is accurate in one sense, but it could be easily misinterpreted to mean that the Commission in 1950 affected a change in policy, which was not the case. Also, at the bottom of page 5 there is the phrase "removal of the unskilled laborers from the classified service was by act of the former Civil Service Commission" which, although technically correct, could be misinterpreted to mean that the Commission did that for the first time in 1950. As stated above, the transcript seems to demonstrate that the exclusion took place as far back as 1923.

In the same decision there are other sentences that indicate that the Court agrees with the Assistant Director of the Department of State Personnel whose testimony

indicated that the policy of an unclassified labor class extended back many years prior to the 1950 action by the Commission.. Such sentences appear at the very bottom of page 5 and continue onto page 6, at the middle of page 6 where the court paraphrases the contents of the minutes of the 1950 action and uses the phrase "impractical to include ..." (emphasis added), and in the top half of page 9 where the court appears to agree with the statement of the Assistant Attorney General regarding the labor class being unclassified as far back as 1923.

The consideration just above of the decision of the Court of Appeals in the Crabtree case has immediate relevance to the principal objective of this entire analysis in that the Memorandum Contra Motion for Rehearing of the appellee, which the appellant-petitioner maintains is in error, proceeded on the basis of that decision.

THE ERRORS CONTAINED IN THE MEMORANDUM CONTRA MOTION FOR REHEARING OF THE APPELLEE

The background of the immediate problem is as follows. On December 14, 1966 the Supreme Court of Ohio overruled the motion for rehearing in the Knox case. On the preceding day, December 13, 1966, the Court of Appeals of Franklin County, Ohio rendered a decision in the Crabtree case in which the appeal of the appellants was remanded to the Board for a decision on the merits of the dismissal. Such action most certainly affirmed the right of an unclassified employee to bring before the Board a question of his unclassified status on the basis that he was in essence a classified employee. But that same court had rendered a decision in the Knox case on May 3, 1966 wherein it was stated that an unclassified employee did

not have such a right. As a result of the above cited decision in the Crabtree case, the appellant-petitioner filed a motion for rehearing with the Supreme Court of Ohio based upon contrary decisions in the Knox and Crabtree cases and upon the resulting denial of equal protection of the law. That motion was also overruled.

The appellee filed in opposition to the motion for rehearing a Memorandum Contra Motion for Rehearing in which it was claimed that the two decisions in the two cases were not contrary due to the presence of different fact situations. With that position the appellant-petitioner emphatically disagrees. In passing judgment on this question raised by the appellee, there are only three factors that must be considered. The first factor is that the Court of Appeals in the decision in the Knox case stated only that an unclassified employee had no right of appeal to the Board on the question of that unclassified status; the court could only have been speaking of the formal classification of appellant Knox since the decision contained absolutely no discussion of the question as to whether or not Knox should have been in the classified service, i.e. whether or not he was in essence a classified employee. The second factor is that both Knox and Crabtree et al. were unclassified employees, formally speaking, who appealed to the Board on the basis that they were in essence classified employees and had been terminated without protection of the civil service law. The third factor is that the Court of Appeals upheld the right of Crabtree et al. to do the very thing that was denied to Knox. Since Knox and Crabtree were in identical positions upon their appeals to the Board with respect to the contents of the decision by the Court of Appeals in the Knox case and since that Court allowed a right to Crabtree that was denied to Knox, then those two decisions by said court

in the Knox and Crabtree cases stand as being contrary and thus constitute a denial of equal protection of the law.

The Court of Appeals said only that a formally classified employee had no right to appeal a question of his status to the Board; that decision contained no other factor relating to the background of appellant Knox. A consideration of the question of whether the decisions in the two cases were contrary or not must be made against that limited statement and that only. An effort to introduce any other factors cannot possibly be justified.

With the above argument as a background, the appellant-petitioner presents the following analysis of the statements and argument presented by the appellee in the Memorandum Contra Motion for Rehearing in opposition to appellant-petitioner's claim that he was denied equal protection of the law. The following statements were made on page 3 of the Memorandum.

First quotation:

> Under date of January 12, 1950 the old Civil Service Commission pursuant to what is now Section 143.08 (A) (12), Revised Code, accomplished a transfer of the entire class of unskilled laborers including the above mentioned individuals from the classified service to the unclassified service. Subsequently, these individuals were terminated from their positions, and appealed to the State Personnel Board of Review. . . .

Second quotation:

> What the court was saying (reference to the Court of Appeals) in effect was that the positions in the Crabtree case had never been validly removed from the classified service and the em-

ployees were therefore in the classified service at the time of their appeal to the State Personnel Board of Review.

In the instant matter Appellant Knox had not been, nor was he ever, vested with classified status.

The statements of fact as contained in the above quotations will be considered first of all, with a discussion of the appellee's argument following at a later point.

In considering the intent of an author it is only reasonable to proceed at the outset on the basis of the commonly accepted usages of the words of the author. So in this instance, and with the above analysis of the term "classified service" in mind, one would interpret the first quotation to mean that on January 12, 1950 the Commission transferred all the unskilled laborers, including Crabtree et al. from their positions in the classified service, formally speaking, to the unclassified service. Following that act, the appointing authority terminated Crabtree et al., and the latter appealed to the Board on March 12, 1964. Such an interpretation would be completely erroneous, but that is how the passage would normally be interpreted. The actual facts are that the Commission did not affect a change in policy as of 1950 and that Crabtree et al. were hired into the unclassified service several years following the 1950 action of the Commission.

Proceeding to the second quotation above, one would interpret it (on the basis of the first quotation) to mean that the Court of Appeals stated in its decision in the Crabtree case that the positions held by Crabtree et al. had not been validly removed from the classified

service by the action of the Commission in 1950. With such an interpretation, the errors concerning the action of the Commission and the date of employment and unclassified status of Crabtree et al. would be repeated and would utilize the decision of the Court of Appeals in support of such errors.

The final sentence in the second quotation was correct only if intended to convey the generally accepted usage of the term classified, i.e. Knox was never formally in the classified service. However, Knox claimed that he was in essence a classified employee.

In the face of such flagrant errors that flow from an interpretation based upon the generally accepted usage of the terms, the appellant-petitioner, for purposes of further analysis, can only rephrase the above quotations in order to present a thought pattern that might have been in the mind of the author of those passages but which certainly did not carry through into print. But even on the basis of such a re-casting of the material, they still will be in error.

Considering the first quotation and employing the facts as the appellant-petitioner interprets them on the basis of the transcript of the hearing before the Board in the Crabtree case and employing the two meanings of the term "classified service," the appellee may have intended to say the following, which is indented for ease of location.

First paraphrase:

> The Commission in 1950 sustained a long established policy of carrying the unskilled laborers in the unclassified service, which began in 1923 when the quality of being in es-

> sence classified employees was legally withdrawn (so regarded until corrected by the decision of the Court of Appeals). Furthermore, Crabtree et al. were hired into the unclassified service in the years following the 1950 action of the Commission on the basis of that long established policy. The latter were terminated from their jobs in 1964 and appealed to the Board on the basis that the positions they had held should have been formally classified because the quality of being in essence classified employees had never been legally withdrawn from the labor class by the earlier actions of the commission.

Such a paraphrase conveys an accurate picture of the facts. The Board and the Common Pleas Court decided that the Commission had acted legally in withdrawing the quality of being in essence classified employees from the labor class and thus denied a further appeal on the merits of the dismissal. The Court of Appeals held that said quality had not been legally withdrawn and thus remanded the case to the Board for a hearing on the merits of said dismissal.

The following is a paraphrase of the second quotation above (but excludes the last sentence).

Second paraphrase:

> What the Court was saying in effect was that the quality of being in essence in the classified service had never been withdrawn from the labor class by the prior actions of the Commission with the result that Crabtree et al., who had

been hired into the unclassified service in the years following said actions by the Commission, were in essence classified employees at the time of their appeal to the Board.

The above paraphrase is the only correct interpretation of the bulk of the second quotation. There can be no question about the fact that Crabtree et al. were unclassified employees, formally speaking, upon their appeals to the Board.

This leaves the last sentence of the second quotation above to be considered in conjunction with the appellee's argument that the appeals of Knox and Crabtree et al. to the Board were dissimilar. There the attempt was made to portray Crabtree et al. as having classified status at some time and which (to use the words of the appellee) "had never been validly removed" whereas Knox had never possessed one bit of classified status (see last sentence of second quotation). And it was upon that statement that the appellee based the alleged distinction between the Knox and Crabtree cases. But such a distinction is not possible in law nor fact.

The facts are that Crabtree et al. and Knox did not have classified status, formally speaking, at the time of their appeals to the Board; all that both parties were able to claim was that they possessed the quality of being in essence classified employees and it was therein that their appeals to the Board were identical. But in the face of those facts the appellee in the Memorandum to the Supreme Court of Ohio made a statement of fact in which it was claimed that Crabtree et al. did have classified status but that Knox did not have such at the time of their respective appeals to the Board. The appellee was in serious error in making such an assertion in the form of

a statement of fact to the Supreme Court of Ohio or any court. Furthermore, in terms of law, only the Board or a court can decide that any particular litigant does not have the quality of being in essence a classified employee, which was all that Crabtree et al. could possibly have claimed. Nevertheless, the appellee in a statement of fact asserted that Crabtree et al. had that quality whereas Knox did not.

The appellee certainly cannot defend the above error on the basis that he was speaking of Crabtree et al. as never having lost the quality of being in essence classified employees and at the same time speaking of Knox as never having been formally classified. Such an error in logic would be most flagrant, for the appellee had to be consistent in the usage of the term "classified" in referring to the two parties.

Nor could the appellee proceed to argue that since a portion of the labor class had formal classified status at one time (although such cannot be proven) and since Knox's position was never formally classified, then a distinction can be based thereon. But such is untenable. The fact that the labor class was illegally removed by a positive act from the classified service whereas Knox was denied classified service by the negative act of failing to include the chief night clerks in the classified service according to law is not a distinction; both the positive act of exclusion and the negative act of failing to take the proper action are equally illegal and grant no favored position to a group of formally unclassified employees many years later with respect to another formally unclassified employee.

CONCLUSION

The appellant-petitioner maintains that the above analysis and arguments thoroughly disprove the erroneous statement of fact and the argument based thereon as presented by the appellee in the Memorandum Contra Motion for Rehearing to the Supreme Court of Ohio for the purpose of proving that the Knox and Crabtree appeals to the Board were not identical. Those appeals were identical, but one was declared to be outside the law whereas the other was allowed, thus constituting contrary decisions and denial of equal protection of the law by the Franklin County Court of Appeals.

Respectfully submitted,

Donald F. Knox
Appellant-Petitioner

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing comparison of the Knox and Crabtree cases was mailed to Robert M. Zitko, Assistant Attorney General, State House Annex, Columbus, Ohio on the ____ day of September, 1967.

Donald F. Knox
Appellant-Petitioner

I certify that a copy of the foregoing comparison of the Knox and Crabtree cases was mailed to John A. Brown, Attorney at Law, 42 East Gay Street, Columbus, Ohio on the _____ day of September, 1967.

Donald F. Knox
Appellant-Petitioner